Supreme Court, U.S.
FILED
AUG 05 1993
OFFICE OF THE CLERK

No: 92-1966

IN THE

Supreme Court of the United States

October Term, 1993

SCOTT NICHOLAS ERRICO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

ROBERT A. BUTTERWORTH
Attorney General

JOAN FOWLER
Senior Assistant
(Counsel of Record)

DEPARTMENT OF LEGAL AFFAIRS
1655 Palm Beach Lakes Boulevard
West Palm Beach, FL 33401

Counsel for Respondent

BEST AVAILABLE COPY

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW iii

PREFACE 1

OPINION BELOW 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

THE FLORIDA COURT DID NOT ERRONEOUSLY CONSTRUE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND THE STATEMENT OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION WAS PROPERLY ADMITTED INTO EVIDENCE AT PETITIONER'S TRIAL. . .

CONCLUSION 13

TABLE OF CITATIONS

Case	*Page*
Arizona v. Fulminante, 499 U.S. ___, 111 S.Ct. 1246, 113 L.Ed.2d 302, *rehearing denied* ___ U.S. ___, 111 S.Ct. 2067, 114 L.Ed.2d 472(1991)	11
Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897)	8
Errico v. State, 608 So. 2d 930 (4th DCA 1992) *rev. denied,* 617 So. 2d 319 (Fla. 1993)	1
Illinois v. Gates, 462 U.S. 213, 257-58, 103 S.Ct. 2317, 76 L.Ed.2d 527, 561 (1983)	12
Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)	8
McNeil v. Wisconsin, 501 U.S. __, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)	11
United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82, L.Ed.2d 677, *rehearing denied,* 468 U.S. 1250, 105 S.Ct 52, 82 2d L.Ed.942 (1984)	12

QUESTION PRESENTED FOR REVIEW

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE ADMITTED INTO EVIDENCE AT PETITIONER'S TRIAL? (Restated)

PREFACE

The following reference will be used by Respondent:

(R) - Record on Appeal

OPINION BELOW

The Opinion of the Florida District Court of Appeal, Fourth District, No. 91-1106, in this cause is reprinted in the Appendix to Petitioner's Petition at App. 1. The case is reported as *Errico v. State,* 608 So. 2d 930 (4th DCA 1992), *rev. denied,* 617 So. 2d 319 (Fla. 1993).

STATEMENT OF THE CASE

Respondent accepts Petitioner's "Course of Proceedings," but not the remainder of his Statement of the Case.

Britain's Scotland Yard was involved in investigating the Brinks-Mat gold bullion robbery involving 26 million dollars which occurred in London in 1983. (R. 5, 30, 51, 182, 265, 269, 272). That investigation also involved the murder of a British police officer. (R. 182). In 1985, Patrick Diamond was the focus of the British police investigation into the gold bullion robbery. (R. 4, 185). The British police believed that Patrick Diamond was laundering monies for at least one of the persons involved in the Brinks-Mat gold bullion robbery (R. 4, 51, 183). The police also suspected Patrick Diamond of being involved in international money laundering operations (R. 36, 183).

As a result of the surveillance of Patrick Diamond, the British police became aware of Petitioner (R. 51, 181). Petitioner met with Patrick Diamond in London on a fairly constant basis for two days. (R. 32, 46, 53, 185). The police learned that Petitioner's name was Stephen Marzovilla. Scotland Yard requested information on Marzovilla from the United States Embassy. There was no information. (R. 54, 185). However, Scotland Yard was aware that Petitioner was traveling extensively throughout the world. (R. 186). Petitioner requested money from Patrick Diamond, who lived on the Isle of Man. The money was transferred from the Isle of Man in such a devious way that the police could not pin point where Petitioner was staying. (R. 186). The fact that Petitioner was traveling around the world and monies were being transferred to him caused Scotland Yard to conclude that Stephen Marzovilla was not Petitioner's true identity. (R. 186).

While in England, Petitioner visited Patrick Diamond's mother. (R. 55). After that, Petitioner went to several safety deposit boxes. (R. 54-55). Petitioner was associating with "top flight London criminals." (R. 55). Scotland Yard discovered that Petitioner would be traveling to Spain. There he was to meet a London criminal who was suspected of being involved in the Brinks robbery. (R. 187). Scotland Yard ordered two officers to approach Petitioner at Heathrow Airport in hopes of determining his true identity. (R. 188).

The officers stopped Petitioner in Heathrow Airport. (R. 5, 6). Petitioner carried a passport identifying him as Stephen Marzovilla. (R. 6). He agreed to have his luggage searched. (R. 10, 21, 35). Two "flick knives" or switchblades were found in a hidden pocket in Petitioner's wash bag. (R. 11, 23, 36). The flick knives are illegal in Britain (R. 36). Petitioner was arrested for the possession of the illegal flick knives. (R. 276). Petitioner had a substantial amount of money on him at the time of the arrest — about $14,000. (R. 62-63).

At the same time, Scotland Yard obtained search warrants for the safety deposit boxes which Petitioner had visited. (R. 57). Located in the safety deposit boxes was approximately $100,000 and a passport along with other identification bearing Petitioner's photograph identifying him as Craig Jacobs. (R. 58, 60, 190-191, 265-268). After further inquiries were made through the FBI representative in London Embassy, the British police found out that Craig Jacobs was the alias of a man by the name of Errico. (R. 191).

Under British law, the police were allowed to stop and search Petitioner and his luggage if there was "reasonable suspicion" that he was involved in some illegal conduct. (R. 7, 10, 16, 27). In the instant case, the British police had "reasonable grounds" to believe that Petitioner committing a crime based on the information noted above. In England, the police can stop anyone to ask who they are, what they

are doing, where they are going, and to ask for identification. (R. 41-43). Furthermore, under British Law, police have the right to stop and search anybody for any reason in the airport without their consent. A person can avoid the search only by leaving the airport. (R. 49).

Upon his arrest at Heathrow Airport, Petitioner was given "Cautionary Warning." (R. 11). The Cautionary Warning informs a person that he is not obliged to say anything unless he wishes to do so, and that anything he does say will be written down and may be used as evidence. (R. 11, 12, 116).

The police who gave Petitioner the Cautionary Warning told him that the Cautionary Warning was similar to *Miranda*[1] warnings in the United States. (R. 11, 114, 116). However, there is nothing in the Cautionary Warning or in the British law that says a detainee has a right to counsel. (R. 116).

Scotland Yard learned from the FBI that Petitioner was wanted for murder and serious drug related matters in the United States. Petitioner was then questioned regarding his true identity and whether Petitioner would be willing to provide fingerprints voluntarily in order to confirm his identity (R. 77-81). Although Petitioner indicated that he did not wish to speak to the police without an attorney, under British law the police can continue to ask questions even though the defendant does not wish to answer. (R. 75-76). Petitioner was told that due to the seriousness of the charges he would not be allowed unsupervised access to an attorney. Petitioner would ordinarily have been brought before the court within 72 hours, but since there was no court on the weekend he was not brought to court until Monday morning. (R. 112). At that time he had a lawyer. (R. 218).

---

1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Scotland Yard Detective Lundy testified that under British law he was entitled to deny a defendant access to a solicitor if he believed that a lawyer would interfere with the administration of justice. (R. 194, 236-237). In the instant case, Lundy was anxious to find out anything he could which pertained to the British end of the operation and, in particular, to Patrick Diamond. (R. 195). Lundy did not want Diamond to find out that the British Police had arrested Petitioner. (R. 195). Had the police given Petitioner an attorney at the early stages, chances were that Diamond would have found out about the arrest through the attorney and vast sums of money would be taken out of the jurisdiction. (R. 196). The result would have been the obstruction of, and interference with, the process of the investigation (R. 195-196). Denial of access to an attorney can be challenged by the defendant in British courts. So it is not a decision that a police officer makes lightly. (R. 197).

Petitioner was interviewed regarding his travels in other countries. (R. 97, 210). On the same day, Petitioner was charged with the possession of forged passports. (R. 97, 210). Petitioner asked to speak with Lundy. Petitioner stated that he wished to come to an "agreement" [plea bargain] with the British Police. (R. 88, 204). Lundy told Petitioner that he would have to tell the police about all the crimes in Britain and the United States if he wanted to plea bargain. (R. 94, 204). The police's primary concern was the Brinks-Mat robbery and information Petitioner may have concerning that robbery. (R. 290). Petitioner said that he would think about it. (R. 94, 205).

Lundy informed Petitioner that Scotland Yard knew his true identity and that he was wanted for homicide and drug related offenses. The British police officer explicitly stated that he wanted to know what Petitioner was doing in the United Kingdom, and how he fit in with the drug trade in Britain. (R. 88). Petitioner admitted that he was involved in

the drug trade but refused to name names or give specifics about his business interests in England. (R. 89, 90, 122).

The police did not ask any questions about the crimes Petitioner was allegedly involved in in the United States. In addition, there were no American officials present during any of the interviews. (R. 148-208). No threats were used and Petitioner understood what was going on. (R. 96). Lundy testified that the primary concern of his investigation was the Brinks-Mat robbery and the related murder of a police officer. (R. 224, 276).

No questioning was conducted for, or on behalf or at the request of, any officials from the United States government. (R. 87, 290). Lundy only pursued matters related to crimes in England. (R. 228, 230). Lundy reminded Petitioner that he was under caution. (R. 210). Petitioner asked Lundy what the British police wanted from him. Lundy answered that they wanted to know what Petitioner was doing in England. (R. 211). Petitioner admitted that the case was strong against him. He hoped to plead to the marijuana trafficking charge to avoid the murder charges. (R. 212). Petitioner admitted that he was involved in a marijuana trafficking operation (R. 212-213). The murders, according to Petitioner, were part of his involvement in the marijuana drug trade. (R. 214).

In a later interview, Petitioner again admitted his involvement in the drug trade. (R. 99). He stated that his involvement in the drug trafficking trade did not extend to the United Kingdom. (R. 100).

Petitioner was later interviewed in the presence of his solicitor, Trevor Hamlyn. (R. 101, 218). By this time, Petitioner's identity had been positively confirmed. (R. 102, 218). The police reminded Petitioner that he was wanted in the United States on various criminal matters. (R. 102, 218). Petitioner replied, "No comment." (R. 102, 218). Petitioner

refused to comment on any of the questions related to the indictments in the United States or his involvement with Patrick Diamond or companies in the Isle of Man. (R. 104-105).

Respondent specifically rejects Petitioner's claim that these references regarding the United States crimes made to British authorities "formed the basis for his conviction." Petitioner would have been convicted even in the absence of these few and fleeting statements. Overwhelming evidence of guilt was presented at Petitioner's trial.

REASONS FOR DENYING THE WRIT

THE FLORIDA COURT DID NOT ERRONEOUSLY CONSTRUE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND THE STATEMENT OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION WAS PROPERLY ADMITTED INTO EVIDENCE AT PETITIONER'S TRIAL.

Contrary to Petitioner's assertions, the opinion of the Florida Fourth District Court of Appeal is not in direct conflict with *Bram v. United States,* 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897) and *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). There is certainly no conflict with *Malloy v. Hogan,* which merely holds that the Fifth Amendment extends to the states through the Fourteenth Amendment. Moreover, *Bram v. United States* deals with a coerced confession, and not a violation of *Miranda,* and is factually distinguishable from the case at bar. After an analysis of the applicable law, the court in *Bram* summarized the factual circumstances as follows:

> The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax and were then held in confinement awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the

sending of one or both of the prisoners into the United States for formal charge and trial. Before the examination had taken place the police detective caused Bram to be brought from jail to his private office, and when there alone with the detective he was stripped of his clothing, and either whilst the detective was in the act of so stripping him, or after he was denuded, the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

"When Mr. Bram came into my office I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' "

The fact, then, is, that the language of the accused which was offered in evidence as a confession was made use of by him as a reply to the statement of the detective that Bram's cosuspect had charged him with the crime, and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, no only is the claim that the statement was voluntary over-

> thrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

168 U.S. at 561-562, 18 S.Ct. at ____, 42 L.Ed. at 580. (emphasis in original).

* * *

> Moreover, aside from the neutral result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed as express intimation rendering the confession involuntary within the rule laid down by the authorities. What further was said by the detective?
>
> " 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.'" But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to

> be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement.

168 U.S. at 564-565, 18 S.Ct. at ___, 42 L.Ed. at 581.

Bram is dissimilar to the instant case. At bar, there was absolutely no physical or mental coercion which was so clearly present in *Bram*. Further, in *Bram* the authorities were detaining and questioning the defendant on behalf of the United States. The investigation was of an American citizen regarding a crime committed in American territory.

Contrast the facts here, where British police officers, in strict compliance with British law, and comporting with due process, questioned Petitioner regarding British crimes. Incident to this questioning, very limited concessions of involvement in criminal activities in the United States were made by Petitioner. These minor concessions, contained in Respondent's Statement of the Case, comprised only a small portion of the evidence of guilt presented by Florida during Petitioner's trial.

Petitioner's argument, taken to its logical extension, is that the rights provided to United States citizens pursuant to *Miranda* must extend worldwide to all foreign jurisdictions. Such is certainly not the case. *Miranda* rights are merely a rule of law interpreting the United States Constitution and are not fundamental. *McNeil v. Wisconsin,* 501 U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). This court has even applied a harmless error analysis to the admission at trial of a coerced confession. *Arizona v. Fulminante,* 499 U.S. ___, 111 S.Ct. 1246, 113 L.Ed.2d 302, *rehearing denied* ___ U.S. ___, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991).

Petitioner's statements in Britain were obtained in strict conformity with British law. Excluding these statements in Petitioner's Florida trial would not serve the purpose of the

exclusionary rule which is to deter future police misconduct. Exclusion of the statements in a Florida court would have no effect on future actions of British police officers in the investigation of British crimes. Justice White has written:

> [A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.

Illinois v. Gates, 462 U.S. 213, 257-58, 103 S.Ct. 2317, 76 L.Ed.2d 527, 561 (1983) (White, J., concurring in the judgment). See also, *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82, L.Ed.2d 677, *rehearing denied* 468 U.S. 1250, 105 S.Ct 52, 82 L.Ed.2d 942 (1984).

Petitioner's case is quite different from *Bram.* Thus, the holding below does not conflict with *Bram.* The decision below turns on its own unique facts, which are not likely to be repeated. The decision will affect few, if any, other litigants. There is no need for this court to review the merits of Petitioner's case.

CONCLUSION

As the decision below does not conflict with any decision of this Court, Florida respectfully requests that this Court decline to accept jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JOAN FOWLER
Senior Assistant
(Counsel of Record)

DEPARTMENT OF LEGAL AFFAIRS
1655 Palm Beach Lakes Boulevard
West Palm Beach, FL 33401
(407) 688-7759

Counsel for Respondent